83-273

No. 83-

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HELEN GALARDO dba TERM CON ELECTRONICS and WILLIAM D. BUCHANAN dba CKG ASSOCIATES

Petitioners,

vs.

AMP INCORPORATED and AMP PRODUCTS CORPORATION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas E. Schatzel
(Counsel of Record)
Kevin G. Rivette
LAW OFFICES OF
THOMAS E. SCHATZEL
A Professional Corporation
3211 Scott Boulevard
Suite 201
Santa Clara, CA 95051
(408) 727-7077

Attorneys for Petitioners

Dated: July 28, 1983

QUESTION PRESENTED

1. What is the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly owned subsidiary in violation of the Sherman Act?

2. What is the proper legal standard for determining when a patented product purchased by the U.S. Government can constitute a relevant market for purposes of a rule of reason antitrust case?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Helen Galardo dba Term Con Electronics and William D. Buchanan dba CKG Associates, respectfully pray that a writ of certiorari issue to review the judgment and opinion

of the United States Court of Appeals for the Ninth Circuit entered on May 2, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, not yet officially reported, appears in the Appendix A hereto. The opinion of the United States District Court for the Northern District of California, appears in Appendix B, and at 1982-1 Trade Cases ¶64.468.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 2, 1983 and this petition

for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976). The basis for original jurisdiction of the District Court for the Northern District of Califoria was based on 28 U.S.C. §1332 (diversity of citizenship) and 28 U.S.C. §1331 (Federal question).

STATUTORY PROVISION INVOLVED

United States Code, Title 15, Section 1, the Sherman Act, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

This is a case of a parent corporation found incapable of conspiring with its wholly owned subsidiary. The Ninth Circuit's affirmance of the partial granting of the directed verdict by the District Court for the Defendants (Respondents) puts in issue whether the Court applied erroneous legal standards in concluding that Respondents AMP

Incorporated and its wholly owned subsidiary AMP Products Corporation were incapable of entering into an intra enterprise conspiracy in violation of 15 U.S.C. §1 and whether a patented product sold to the Federal Government can constitute a valid relevant submarket for purposes of a rule of reason Section 1 antitrust case.

1. Factual Background

The essential facts are not in dispute. AMP Incorporated and AMP Products Corporation are affiliated corporations. AMP Products Corporation is a wholly owned subsidiary of AMP Incorporated. Both corporations maintain separate:

1) headquarters (RT-2795);

2) incorporation (RT-2795);

3) employees (RT-1771);

4) sales offices (RT-1771);

5) payrolls (RT-1771);

6) sales records (RT-1735);

7) data processing facilities (RT-1734);

8) warehouses (RT-1734);

9) packaging facilities (RT-1734);

10) filing systems (RT-1735);

11) account books and records (RT-1735);

12) balance sheets (RT-1736); and

13) purchasing records.

Both corporations marketed AMP manufactured products (RT-2796) while AMP Products Corporation also markets its own manufactured products (RT-832). Among the AMP products marketed by both corporations is a specific wire connector designated as a Picabond. The

Picabond is a patented AMP product (RT-875).

Since the middle 1960's the United States Government, via its purchasing agent, the Defense General Supply Center (DGSC), has been a major purchaser of the AMP Picabond. In procuring Picabonds for the Federal Government, mainly for use in defense related concerns, the DGSC will accept bids from prospective suppliers. Usually the DGSC will award the bid to the lowest bidder. By this means, the Federal Government seeks to receive only the lowest prices on the products it purchases. From the time that the Government first started purchasing Picabonds up until about 1978, all DGSC Picabond contracts were awarded to AMP Products Corporation as the lowest bidder (RT-848) (PX-234).

AMP Products Corporation's sales of Picabonds to the DGSC in this manner was considerable.

In 1978 Petitioner William D. Buchanan through his company CKG Associates, solicited and purchased certain AMP products from AMP Industrial, a division of AMP Incorporated. Initially, CKG Associates paid full book price for the parts it purchased from AMP Industrial. But, as the relationship between AMP Industrial and CKG Associates developed, CKG received favorable pricing on AMP parts. Such pricing was determined by the quantity of parts purchased and/or competition between manufacturers of similar parts. During 1978 CKG Associates learned of the DGSC's

Picabond requirements and sought information from AMP Industrial concerning CKG Associates' purchase of AMP Picabonds. In response to CKG Associates' inquiry as to the price of the Picabond, AMP Industrial suggested that CKG solicit bids on other Picabond-type products manfactured by other manufacturers so as to be eligible for competitive pricing. In other words, if CKG Associates could purchase a part AMP Industrial considered to be equivalent to its Picabond, AMP Industrial would modify its Picabond prices so as to be competitive with the prices of the product AMP Industrial deemed to be competitive with the Picabond. In real terms, this usually proved to reduce the price of the AMP product.

AMP Industrial provided CKG Associates with a list of parts that AMP Industrial considered competitive with the AMP Picabond. Armed with this list, CKG Associates solicited and received prices on the products AMP Industrial considered equivalent to its Picabond.

CKG Associates related these competitive prices to AMP Industrial and received a competitive price for the AMP Picabond. Under these terms CKG Associates purchased certain quantities of Picabonds from AMP Industrial.

CKG Associates operated in conjunction with the other Petitioner, Helen Galardo, who operated a small electronics supply company by the name of Term Con Electronics. CKG Associates

would purchase and sell to Term Con Electronics any AMP parts Term Con Electronics required. Term Con would then resell the AMP parts to its customers. Due to the price advantage CKG Associates was receiving from AMP Industrial, CKG Associates could sell the AMP parts, including the Picabonds, to Term Con Electronics at reduced prices. These reduced prices Term Con Electronics passed along to its own customers, including the U.S. Government, allowing Term Con Electronics to establish a competitive pricing edge in the Picabond market.

In 1978 Term Con Electronics first bid on and received a DGSC Picabond contract. Subsequent to that, Term Con Electronics bid on and received two

additional DGSC Picabond contracts (RT-2775). In all three instances, Term Con Electronics' bid was lower than that of AMP Products Corporation which had traditionally received all DGSC Picabond bids. Subsequent to the loss of the DGSC bids AMP Products Corporation instituted an investigation to determine the reason it was losing the DGSC bids (RT-986) (PX-234). The investigation revealed that AMP Industrial was the source of Term Con Electronics low priced Picabonds, via CKG Associates (RT-921).

In response to this discovery, personnel from AMP Products Corporation contacted personnel at AMP Industrial concerning the sale of Picabonds to CKG Associates (PX-237). Within weeks of

such contacts and just prior to the bidding on a major DGSC Picabond contract, CKG Associates' favorable pricing was terminated by AMP Industrial (PX-264; PX-715; PX-256). The result thereof was the inability of Term Con Electronics to bid against AMP Products Corporation for a lucrative DGSC Picabond contract and Term Con Electronics was forced to default on one of its Picabond bids to the DGSC.

AMP Products Corporation received the award of the bid on which Term Con Electronics defaulted (RT-2795).

2. Proceedings Below

The initial Complaint in this action was filed by CKG Associates and Helen Galardo dba Term Con Electronics

against AMP Incorporated in the Superior Court of Santa Clara County, California. The original Complaint sought specific performance, declaratory relief and damages for breach of contract and interference with business relations.

On a motion by AMP Incorporated, the case was removed to the United States District Court for the Northern District of California. Original jurisdiction in the district court was based on 28 U.S.C. §1332. Subsequent to the removal, William D. Buchanan was joined as a party Plaintiff and Plaintiffs were allowed to and did file an Amended Complaint alleging, among other things, antitrust violations against AMP Incorporated and AMP Products Corporation. Original

jurisdiction for the Amended Complaint was based on 28 U.S.C. §1331 and 28 U.S.C. §1332. At the time of filing the Amended Complaint, AMP Products Corporation was joined as a party Defendant. AMP Incorporated and AMP Products Corporation filed a counterclaim for conversion and damages for goods sold and delivered on account.

At trial, Defendants moved for and were granted a directed verdict as to Plaintiffs' antitrust causes of action after Plaintiffs had presented their case in chief. Plaintiffs' remaining causes of action and Defendants' counterclaim were decided by the jury. The jury held for the Defendants.

Plaintiffs appealed the granting of the directed verdict and certain jury instructions to the United States Court of Appeals for the Ninth Circuit. Oral argument in the appeal was heard on April 13, 1983 and the Court of Appeals judgment was entered on May 2, 1983. The Ninth Circuit affirmed the District Courts granting of the directed verdict and the jury instructions.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeal As To The Proper Standard For Determining An Intra Enterprise Conspiracy In Violation Of The Sherman Act

The decision below effectively denies the protection of Congress' Antitrust Laws to victims of intra-corporate conspiracies. In doing so, it

points out the need for this Court to once more reaffirm its decision in United States v. Yellow Cab Co., 332 U.S. 218 (1947) as it has in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) and Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) and declare with precise standards that antitrust violators, conspiring to restrain trade, whether with or without the corporate shroud, will not be tolerated.

The state of the law concerning the intra enterprise conspiracy doctrine in this country is badly in need of this Court's guidance. The different circuits have all but forsaken this Court's decisions regarding the

conspiracy doctrine for their own brand of antitrust law. Individual circuits appear to be experimenting with the conspiracy law to determine how they want to enforce it, if at all. The Ninth Circuit in Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977) summed up the situation by stating

> "The antitrust cases determining the existance or absence of any intra-enterprise conspiracy, when taken collectively, resemble a thaumatrope. Rules seemingly clear on their face become an unresolved conceptual blur when applied to the variant fact situtations presented by diverse economic entities and functional structures". 553 F.2d at 625.

Of particular importance at this time are the two tests used by the Ninth and Third Circuits for determining

whether two affiliated corporations are capable of conspiring in violation of Section 1 of the Sherman Act. The Ninth Circuit utilizes "all the facts and circumstances" test, see Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), cert.denied, 447 U.S. 906 (1980), Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977), and Mutual Fund Investors, supra. The Third Circuit employs the "strict incorporation" rule, see Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3rd Cir. 1978), cert.denied, 439 U.S. 876 (1978), Glauser Dodge v. Chrysler Corp., 570 F.2d 72 (3rd Cir. 1977), cert.denied, 436 U.S. 913 (1978), and Cromar Co. v. Nuclear Materials Equip. Corp., 543 F.2d

501 (3rd Cir. 1976). The differences between these two tests and the Circuits' applications thereof are quite striking.

The "all the facts and circumstances" test is basically an eclectic approach to the question of capacity to conspire. All relevant "facts" are evaluated to determine if the affiliated corporations are "separate economic units", see Las Vegas Sun, supra. This approach entails the use of a list of undefined variables, which are reviewed to determine whether affiliated corporations are "separate economic units". The list is amorphous, never having been defined, and increases or decreases dependent upon the caprice of the court or jury. It was under this

test that AMP Incorporated and AMP Products Corporation were declared to be incapable of conspiring. This test sets forth no real standards by which the finder of fact may quantitatively determine the capacity of two companies to violate the Sherman Act. Furthermore, this test fails to provide Plaintiffs, Defendants, and Business entities with any way to determine if an antitrust violation has occurred. This lack of definition contributes to complex litigation as all parties must seek the bench's interpretation to resolve any antitrust issues in this area. Definite rules and standards would help prevent unnecessary antitrust suits from clogging our court calendars.

The Third Circuit's test, the "strict incorporation standard", is radically different. While the "all the facts and circumstances" test is illusory, the "strict incorporation standard" is clear and definite. The Third Circuit's test holds simply that any two or more legally distinct corporations may conspire. No further inquiry is held to determine the capacity issue. From this starting point, the issue of whether or not a conspiracy has transpired is before the court for determination.

The Ninth Circuit in Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 491 at N.8 (9th Cir. 1979) and Mutual Fund Investors, supra, has expressly rejected the "strict

incorporation" standard of the Third Circuit.

A further conflict between the Courts on this issue is highlighted in Ogilvie v. Fotomat Corp., 641 F.2d 581, 558 at N.20 (8th Cir. 1981) wherein the Eighth Circuit lambasts the Third Circuit's approach as being "rejected as unworkable and unreal". That court goes on and declares that, "The Circuits... do not agree on the limits of this intra enterprise conspiracy doctrine...", 641 F.2d at 558.

The internal conflict between the Courts could not be clearer. No consistent conspiracy doctrine prevails in our nation today. Had the instant case been tried in the Third Circuit,

the probability is great that it would be the Respondents, not the Petitioners, that would now be seeking this Court's review and guidance as to this issue. This ability to pick and choose the forum of a lawsuit based on the law of the forum has historically been viewed with disapproval, see Erie v. Tompkins, 304, U.S. 65 (1938), but, in today's Federal Courts, just such forum shopping is available. Only guidance, by this Court, can prevent further forum shopping and confusion with regard to this issue.

These conflicts justify the grant of certiorari to review the judgment below.

2. This Case Should Be Consolidated With Copperweld Corporation and Regal Tube Company v. Independence Tube Corporation, Or In The Alternative, Judgment On This Petition Postponed Until After Copperweld Has Been Decided To Avoid Inconsistent Decisions And To Further Judicial Economy

Earlier this year, this Court granted certiorari in the Copperweld Corporation and Regal Tube Company v. Independence Tube Corporation case, ____ U.S. ____ (No. 82-1260), 51 Law Week 3687. Both this case and Copperweld, supra, present identical issues for review. Both actions seek this Court's guidance on the issues of the proper standards for determining when a parent and its wholly owned subsidiary can conspire.

The Copperweld case was decided last year by the Seventh Circuit (691 F.2d 310) in favor of the Plaintiffs and

is before this court on petition from the Defendants.

As both cases present identical issues, it would be in the best interest of judicial economy if this instant action and the Copperweld case were consolidated or, in the alternative, if this Court's decision on whether to grant certiorari in this case be postponed until Copperweld, supra, has been decided. In either instance, precious judicial time will be conserved and inconsistent diversions avoided.

3. This Court Should Confirm That Petitioner's Showing Of A Relevant Market In The Federal Government Picabond Market Was A Valid Relevant Market For The Purpose Of Providing A Rule Of Reason Antitrust Cause Of Action

The Court of Appeals and District Court opinions found that Petitioners' proof of a relevant market was inadequate. The Court of Appeals summarily dismissed this issue citing United States v. E. E. DuPont & Co., 351 U.S. 377 (1956) or Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). The District Court relied primarily on Brown Shoe Co., supra. Neither opinion examined Petitioner's evidence in light of either of these cases.

Petitioners established at trial all of the criteria for proving a relevant submarket according to Brown

Shoe Co., supra. The criteria set forth in that case demands a showing of at least some of the following to support a finding of a submarket:

1. That the product in question is not reasonably interchangeable or cross elastic with another product;

2. That there is industry or public market recognition of the proposed market;

3. That the product in question have particular unique characteristics;

4. That the product be manufactured at unique production facilities;

5. That the market has distinct customers;

6. That the product has distinct prices; and

7. That the product is relatively insensitive to price changes.

Petitioners at trial satisfied all of these criteria. Petitioners demonstrated that:

1. There did not exist any interchangeability or cross elasticity in demand for Picabonds in the Government market due to the fact that the part was patented and that the Government specified the Picabond specifications in its proposal for bids (RT-3584; RT-875);

2. The industry recognized the DGSC Picabond market due to the fact that the Government specifically specified the Amp Picabond in its own bid requirements (RT-884);

3. The Picabond was only available from one source because it was patented and Amp Incorporated owned the patent (RT-3610);

4. The Picabond had unique product characteristics due to the fact that it was the only product that would fit particular tooling with the same functionality (RT-886);

5. The Picabond had unique production facilities as the part was patented;

6. The distinct customer for this part was the DGSC;

7. The product had distinct prices and such prices were inelastic as the Government requirements necessitated the purchase of the Amp Picabond. If the Picabond was offered only at one high price, such price would be paid, but, if the same Amp Picabond were to be offered at a reduced price the DGSC would opt for the lower priced Picabond (RT-236).

The Court of Appeals and the District Court failed to find a relevant market with the above facts, among others, in evidence. Such a refusal to find a relevant market is in direct conflict with this Court's decision in Brown Shoe Co., supra, and should be reversed. Nonreversal of this issue will place the present clear tests for relevant markets in the same turmoil as the intra enterprise conspiracy doctrine. Individual circuits will proceed to establish their own independent tests on the subject and further forum shopping will be available in the Federal System.

Finally, the decision below, if let stand, will invite increased antitrust conspiracies not less conspiratorial

action. For the decision below, without setting forth strict guidelines, has all but sanctioned intra enterprise conspiracies under the cloak of the affiliated corporation and left wide open the proper standards for relevant markets.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

Thomas E. Schatzel
(Counsel of Record)
Kevin G. Rivette
LAW OFFICES OF
THOMAS E. SCHATZEL
A Professional Corporation
3211 Scott Boulevard
Suite 201
Santa Clara, CA 95051
(408) 727-7077

by _____
Thomas E. Schatzel
(Counsel of Record)

and by _____
Kevin G. Rivette

Attorneys for Petitioners

Dated: July 28, 1983

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LAW OFFICES OF
THOMAS E. SCHATZEL
A Professional Corporation
3211 Scott Boulevard
Suite 201
Santa Clara, CA 95051
(408) 727-7077

Attorneys for Petitioners

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In the

UNITED STATES COURT OF APPEALS

HELEN GALARDO dba TERM CON ELECTRONICS, CKG ASSOCIATES, and WILLIAM D. BUCHANAN dba CKG ASSOCIATES

Plaintiffs/Appellants,

vs.

AMP INCORPORATED and AMP PRODUCTS CORPORATION

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Thelton E. Henderson, District Judge, Presiding

Argued and Submitted April 13, 1983

Before: KILKENNY, SKOPIL and FERGUSON, Circuit Judges.

Plaintiffs appeal the judgment of the district court, which incorporated a

directed verdict in favor of defendants on federal and state antitrust claims and a jury verdict in favor of defendants on pendant contract and tort claims. We affirm.

Plaintiffs claimed that AMP and its wholly-owned subsidiary AMP Products Corporation (APC) conspired to raise prices of AMP products sold to CKG Associates, thus causing injury to CKG and its only customer Term-Con, in violation of Sherman Act § 1, 15 U.S.C. § 1. They also claimed that defendants monopolized the market for the sale of AMP's "Picabond" connectors to federal government agencies, in violation of Sherman Act § 2, 15 U.S.C. §2.

The district court correctly found no substantial evidence to support plaintiffs' contention that AMP and APC held themselves out as competitors or that they had separate command structures. Thus it was justified in concluding that the two corporations were a single economic unit incapable of conspiring. Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-18 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980). Plaintiffs also failed completely to offer evidence from which a jury could have found a relevant market, see United States v. E.I. du Pont & Co., 351 U.S. 377 (1956), or submarket, see Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962), in government purchases of Picabonds. Thus a jury could have found neither anti-

competitive effect nor monopolization. Federal cases are applicable to California Cartwright Act. See 1 Witkin, Summary of California Law § 450, at 379 (8th ed. 1973). The district court thus correctly granted the directed verdict as to both federal and state antitrust claims.

As to the state claim for interference with prospective economic advantage, the district court clearly erred in placing the burden of proof on plaintiffs to show that the actions complained of were unprivileged. See Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664 (1978). In this case, however, the error is harmless. AMP claimed that it had initially offered the price it did

in order to meet the price quote plaintiff Buchanan said he had received from a competitor, and it had withdrawn that pricing when it determined that the price it was asked to meet was for a non-equivalent product. The jury was instructed to find for defendants on the claim of breach of good faith and fair dealing if it determined that AMP had withdrawn its pricing for this reason. By finding for defendants on that issue, therefore, the jury found that AMP withdrew its pricing for the reason it gave, and not for the purpose of injuring plaintiffs. Thus the question of whether defendants were privileged to attempt to injure plaintiffs by reason of their competitive relationship was never reached.

The other instructions raised by plaintiffs either do not contain reversible error or need not be addressed given the above analysis. Therefore, the judgment is

AFFIRMED.

In the

UNITED STATES COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

HELEN GALARDO, et al.,

Plaintiffs,

vs.

AMP INCORPORATED, et al.,

Defendants.

AMP INCORPORATED, et al.,

Counterclaimants,

vs.

HELEN GALARDO, et al.,

Counterdefendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR DIRECTED VERDICT

Helen Galardo, sole proprietor of Term-Con Electronics ("Term-Con"), and William Buchanan, sole proprietor of CKG Associates ("CKG"), filed suit against defendants AMP Incorporated ("AMP") and AMP Products Corporation ("APC") in 1979 alleging violations of the Sherman Act, 15 U.S.C.. § 1 et seq., and the Cartwright Act, Cal. Bus. and Prof. Code §§ 16600 et seq., breach of contract, intentional interference with prospective economic advantage, and related claims. After two years of litigation and six weeks of trial, defendants moved for a directed verdict on all of plaintiffs' causes of action.

Having considered at great length the extensive papers[*] and oral arguments both parties presented in conjunction with this motion, and the testimony and proceedings in this case, and good cause appearing therefor,

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[*] Oral argument on defendants' motions for directed verdict was entertained throughout the day of December 8, 1981. Prior to that hearing, the Court had requested defendants to file a brief in support of their motion not later than December 1 and plaintiffs an opposition not later than December 3, 1981. When plaintiffs filed no opposition by the end of December 3, the Court made inquiries and was informed by plaintiffs' counsel that they did not intend to file a brief. Nonetheless, on the morning of December 8, only minutes before oral argument was to commence and in disregard of the Court's express deadline, plaintiffs' counsel provided two memoranda. These papers properly should not be considered for that reason, but to protect plaintiffs' interest in this litigation, we have reviewed them thoroughly.

THIS COURT HEREBY ORDERS that a directed verdict is granted in favor of defendants AMP and APC on all of plaintiffs' antitrust claims. Defendants' remaining motions for directed verdict are denied.

I

Background and Proceedings

Before beginning a discussion of the bases for the Court's rulings, a brief description of the parties and their dispute is essential.

Defendant AMP manufactures various types of electronic connectors, splices, and terminals including its own patented Picabond parts. Through a marketing division entitled AMP Industrial Division, and according to AMP's "Market

Charters," AMP sells these products to original equipment manufacturers (OEMs) and other large volume commercial users.

Defendant APC is a wholly-owned corporate subsidiary of AMP which was formed for the purpose of marketing AMP devices to a different group of customers. Specifically, the parent company's "Market Charters" direct APC, through its own marketing division AMP Special Industries (ASI), to service governmental agencies, distributors and other private commercial entities.

Plaintiff William Buchanan is the sole proprietor of CKG Associates, a metal fabricating business which began purchasing electronic parts from AMP in 1978 and supplying them to plaintiff

Helen Galardo's Term-Con Electronics. Galardo, an associate and employee of Buchanan's, in turn, sold the AMP products to government agencies and commercial enterprises including United Airlines.

According to plaintiffs, beginning in the spring of 1979, defendants initiated a conspiracy to eliminate CKG and Term-Con as competitors in the sale and distribution of AMP products by refusing to perform allegedly valid contracts and by disparaging Term-Con to customers.

Defendants characterize the events which led up to this lawsuit in a wholly different fashion. According to AMP and APC, Buchanan fraudulently represented

that he was an original equipment manufacturer so as to obtain parts from AMP at preferential prices which CKG's alter ego, Term-Con, was then able to employ to bid successfully on lucrative government contracts. Had Buchanan accurately represented that he was going to distribute the products, AMP's "Market Charters" would have dictated that he purchase from ASI at a higher price. Because ASI also bids on government contracts, Term-Con then would not have been able to underbid ASI. According to defendants, when they eventually discovered the fraud they discontinued preferential pricing for CKG and transferred the account to ASI where it properly belonged.

II

Standard for Directed Verdict

Upon the motion of a defendant, the District Court shall issue a directed verdict if there exists no substantial evidence to support the plaintiff's claim. Rutledge v. Electrical Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975). Substantial evidence means "more than a mere scintilla"; it requires sufficient relevant evidence from which a reasonable person might conclude in plaintiff's favor. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 n.2 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978). If a reasonable person could draw only one conclusion from the evidence, then a directed verdict is warranted. Cal.

Computer Products v. Intern. Business Machines, 613 F.2d 727 (9th Cir. 1979).

In making this assessment, the Court must accord the nonmoving party the benefit of all reasonable evidentiary inferences. Rutledge, supra, 511 F.2d at 677; accord, Cal. Computer Products, supra, 613 F.2d at 733-734. Furthermore, we are guided by the realization that a directed verdict would deny plaintiffs a jury trial and, as a result, should be granted, if at all, only after careful consideration and deliberation.

The standard outlined above applies with equal force to antitrust claims such as the ones presented in the instant case. As the Ninth Circuit has

expressly indicated on numerous occasions, the notion that directed verdicts are frowned upon in antitrust cases is wholly without foundation. See Cal. Computer Products, supra, 613 F.2d at 734 n.4 for a partial list of cases. On the contrary, a District Court conducting an antitrust trial is under the same duty to direct a verdict for defendants in the absence of substantial evidence to support plaintiff's claim as is a District Court entertaining any civil cause of action. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 n. 6 (1962); Rutledge, supra, 511 F.2d at 677.

III

Sherman Act Section 1 Claim

In their first claim, plaintiffs allege that defendants AMP and APC agreed, combined and conspired to restrain trade in the distribution and sale of electrical connectors, splices, terminals and other components. Defendants cite at least two independent bases for directing a verdict in their favor on this cause of action.

a. Capacity to Contract, Combine or Conspire

First and foremost is defendants' contention that plaintiffs have failed to elicit any evidence sufficient to establish that AMP and APC are two separate and distinct entities capable of agreeing, combining or

conspiring within the meaning of the Sherman Act.

Section One of the Sherman Act, 15 U.S.C. 1, prohibits combinations, contracts and conspiracies in restraint of trade. To conspire or combine within the meaning of that section, affiliated corporations such as AMP and APC must be sufficiently independent of each other for their concerted action to implicate antitrust concerns. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979). Mere separate incorporation without more clearly does not establish the requisite capability. (sic) Harvey, supra; Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980).

Whether two corporations within a single corporate family are distinct entities able to combine or conspire hinges upon the particular facts of a give case. Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977). No litmus test has yet been developed, but the Supreme Court and the Ninth Circuit have designated the central criteria for consideration. If the companies hold themselves out as competitors, then a finding that they are capable of conspiring or combining is especially appropriate. Las Vegas Sun, supra, 610 F.2d at 617, citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951). Also crucial to this determination is whether the related corporations operate

under a unified command structure. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 927 n.5 (9th Cir. 1980). Should an analysis of these and related factors fail to establish that the two related corporations function as two different economic units, then a violation of Sherman Act §1 becomes impossible. Harvey, supra; Las Vegas Sun, supra.

In the instant case, plaintiffs readily admit that AMP and APC share common directors and officers and, therefore, are under unified control. And though plaintiffs promised to present evidence of regular competition between AMP and APC, all that has been shown is, at best, a rivalry amongst some salesmen for certain new accounts.

A reasonable person could not conclude based upon the testimony and exhibits that plaintiffs have presented that AMP and APC regularly compete with one another, let alone hold themselves out as competitors.

In fact, the thrust of plaintiffs' presentation both at trial and in oral argument has been that AMP and APC are separate entities within the meaning of Sherman Act § 1 because they are separate corporations which maintain separate facilities, marketing divisions and training programs. Mere separate incorporation, however, is insufficient to show duality, as noted above. See, e.g., Harvey, supra. Nor does case law

suggest that the other factors plaintiffs have mentioned, either alone or in combination, provide a basis from which a reasonable person could find two distinct actors, especially in view of substantial evidence that AMP and APC are jointly managed by a single group of directors and officers, that policy decisions affecting both companies emanate from the parent, and that they neither regularly compete nor hold themselves out as competitors. See, e.g., Harvey, supra; Las Vegas Sun, supra.

Under comparable circumstances in which the evidence demonstrated that affiliated corporations were jointly managed and did not regularly compete with each other, courts in this and other districts have granted summary

judgment or a directed verdict. See, e.g., Call Carl, Inc. v. BP Oil Corporation, 403 F. Supp. 568 (D. Md. 1975), aff'd on this issue, 554 F.2d 623, 628 (4th Cir. 1977), cert. denied, 434 U.S. 923 (1977); Thomsen v. Western Elec. Co., Inc., 512 F. Supp. 128 (N.D. CA. 1981); Island Tobacco Co. v. R. J. Reynolds Industries, 513 F. Supp. 726 (D. Hawaii 1981). Having accorded plaintiffs the benefit of all reasonable evidentiary inferences, and having found no substantial evidence upon which the jury might conclude that AMP and APC are two discrete economic entities capable of combining or conspiring, we are similarly constrained to issue a directed verdict in favor of defendants on plaintiffs' Sherman Act § 1 claim.

b. Per Se Rule

Even if plaintiffs had been able to demonstrate that AMP and APC are capable of conspiring or combining, a directed verdict still would be necessary. That result would be dictated by plaintiffs' failure to present substantial evidence from which the jury could conclude, based upon a per se analysis or the rule of reason, that defendants' actions constitute a violation of Sherman Act § 1.

As noted earlier, Section 1 of the Sherman Act condemns conspiracies and combinations which unreasonably restrain trade. A few types of restraints, because of their pernicious effect on competition and lack of redeeming value, have been held to be unreasonable per

se. Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958). They are only four in number: horizontal and vertical price fixing, horizontal market division, group boycotts or concerted refusals to deal, and tie-in sales. Gough v. Rossmoor, 585 F.2d 381 (9th Cir. 1978). In the instant case, plaintiffs contend that defendants have engaged in a group boycott which should be conclusively presumed unreasonable according to the per se rule. We disagree.

As defendants point out in their memorandum in support of their motion for directed verdict, the Ninth Circuit has not endorsed application of the per se rule to group boycotts in the absence of an attempt by horizontal competitors

to deprive plaintiff of the elements necessary to compete. Gough, supra, 585 F.2d at 387, citing Sullivan, Handbook of the Law of Antitrust, at 259 (1977). Neither prerequisite is present here. The evidence at trial has revealed that defendants AMP and APC are not horizontal competitors, but instead, two vertically related entities. Moreover, plaintiffs have not alleged or demonstrated that defendants deprived them of the essentials for competition--defendants' products--but instead, only of preferential pricing. Plaintiffs have cited no cases, and we are aware of none, in which the per se rule has been employed under similar circumstances. See Gough, supra, 585 F.2d at 387.

The authorities which plaintiffs cite in support of their assertion that defendants' actions warrant condemnation per se all are distinguishable on their facts and or reasoning. Unlike the instant case, both Klors, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959), and United States v. General Motors Corp., 384 U.S. 127 (1966) involved broad based conspiracies amongst large numbers of dealers and/or manufacturers who sought to deprive competitors of a particular product. And Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376 (9th Cir. 1981), which cites Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979), simply notes that vertical price maintenance, when initiated to suppress competition, may be subject to

a conclusive presumption of illegality. None of these cases suggests that a parent corporation's decision to withdraw preferential pricing from a competitor of its wholly owned subsidiary should be judged by the per se standard.

In the absence of case law supporting its use in the instant suit, we are loathe to employ the per se rule. Both the Supreme Court and the Ninth Circuit have cautioned against impromptu application of a conclusive presumption of illegality. Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977); White Motor Co. v. United States, 372 U.S. 253 (1963); Gough, supra. Moreover, plaintiffs have made no showing that the challenged conduct is likely to have a

pernicious effect on competition such that per se treatment would be warranted. See Gough, supra, 585 F.2d at 388; Ron Tonkin, supra, 637 F.2d at 1386-1387. Even granting plaintiffs all reasonable evidentiary inferences, we cannot conclude that the actions of AMP and APC constitute a per se violation of Sherman Act § 1.

c. Rule of Reason

Because the per se rule is inapplicable, plaintiffs can triumph only by showing that defendants' practices transgress the rule of reason. Even if plaintiffs had been able to prove that AMP and APC are two distinct entities capable of conspiring, they would have stumbled here.

In short, a restraint violates the rule of reason if, within the context of a particular fact situation, its adverse effect on competition outweighs its positive effect. Gough, supra, 585 F.2d at 388-389, citing Chicago Board of Trade v. United States, 246 U.S. 231 (1918). Unlike the per se rule, the rule of reason does not conclusively presume that the existence of the restraint alone, absent an examination of its actual impact on competition, constitutes a violation of Section 1. Rather, the plaintiff must demonstrate that the defendants' agreement was intended to and actually did injure competition. Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980).

Essential to proving an injury to competition is an adequate definition of the relevant market. Gough, supra, 585 F.2d at 389; Kaplan, supra, 611 F.2d at 291. As the Supreme Court and the Ninth Circuit have emphasized, it is the injury to competition in a definable product and geographic market which distinguishes an antitrust violation from a tort. Continental T.V., supra, 433 U.S. at 53, n.21; Kaplan, supra, 611 F.2d at 291.

In delineating the relevant market, we are guided by Chief Justice Warren's opinion in Brown Shoe Co., Inc. v.

United States, 370 U.S. 294, 325 (1962):[*]

> The outer boundaries of a product market are determined by the reasonable interchangeablility of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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[*] The Supreme Court's analysis of market definition in Brown has been applied by the Ninth Circuit in both Sherman Act § 1 and § 2 cases. Kaplan, supra, 611 F.2d at 292, n. 2.

Plaintiffs have failed to address these considerations in the instant case. Apparently, plaintiffs characterize the relevant market as the sale of Picabond parts and delineate a submarket consisting only of sales to the government; but there is nothing in the government constitute a relevant submarket; they do not examine the practical indicia of Brown which would enable the jury to determine whether such a submarket is "economically significant." Brown Shoe, supra, 370 U.S. at 325. And plaintiffs' characterization alone is not sufficient. See Gough, supra, 585 F.2d at 389, citing Knutson v. Daily Review, Inc., 548 F.2d 795, 803-804 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

In the absence of sufficient evidence from which reasonable people could determine the parameters of the field of competition, plaintiffs cannot establish a violation of Sherman Act § 1 under the rule of reason. See, e.g., Gough, supra; Lee Klinger Volkswagen v. Chrysler Corp., 583 F.2d 911, 914-915 (7th Cir. 1978). Accordingly, defendants are entitled to a directed verdict not only because plaintiffs have failed to present substantial evidence from which a jury could conclude that AMP and APC are capable of conspiring or combining, but also because plaintiffs have failed to elicit evidence from which a jury could conclude that competition in a definable market has been injured.

IV

Sherman Act Section 2 Claim

Plaintiffs' Sherman Act § 2 claim suffers from one of the fatal flaws which doom its § 1 cause of action: failure to define adequately a relevant market and submarket.

Section 2 of the Sherman Act prohibits monopolization of "any part of interstate commerce." To sustain a cause of action for monopolization, plaintiffs must show an injury to competition resulting from the acquisition of monopoly power--the power to control prices or exclude competition--in a relevant market. ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975).

As noted earlier, the outer reaches of a particular market are marked by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." Brown Shoe, supra, 370 U.S. 294, 325 (1962). And the existence and makeup of a relevant submarket are determined by examination of Brown's seven practical indicia discussed earlier.

In the instant case, plaintiffs allege that defendant AMP has monopolized interstate commerce in the sale and distribution of electronic and electrical connectors, terminals, splices and related components. Plaintiffs' focus is a submarket allegedly consisting of the sale of

Picabond parts to the U.S. Government; but their allegations are not supported by the evidence in this case.

As intimated earlier, commercial realities, not the assertions of plaintiffs, determine the contours of the relevant market. Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980). A meaningful market definition from which a jury can determine whether an injury to competition has occurred can be achieved only after examining "all relevant sources of supply, either actual rivals or eager potential entrants to the market." SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3rd Cir. 1978). Determining the area of effective competition also requires that

plaintiffs scrutinize industry customers and their peculiar needs. Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 710 (7th Cir. 1978), cert. denied, 439 U.S. 822 (1978).

In asserting that the appropriate line of commerce consists of Picabond sales to the government, plaintiffs in the instant case have ignored these well-tested principles of market definition. Although on occasion a single manufacturer's products may constitute a relevant market, Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972), plaintiffs have failed to demonstrate why that should be true in this case. Nor have plaintiffs produced evidence supporting their contention that a submarket consisting of a single

customer--U.S. Government--has any economic significance. Why other purchasers of electronic splices and components such as commercial airlines, state governments, and the communications industry should be excluded from the marketplace for purposes of this case has not been addressed.

The consequences and implications of plaintiffs' failure to examine and define the relevant market adequately are well-illustrated by Havoco, a Section 1 case similar in many ways to our own. In Havaco, plaintiff, an independent marketer of coal, alleged that defendant Shell Oil Company and its subsidiaries had conspired to establish Shell as the preeminent seller of coal

to the Tennessee Valley Authority (TVA). In affirming a lower court dismissal of plaintiff's complaint for failure to state a claim, the Seventh Circuit indicated that a plaintiff's loss of a single contract with a single purchaser does not comprise an injurious effect to competition. For the purposes of both Sections 1 and 2, the Court stated that "there must be some allegation of a harmful effect on a more generalized market than TVA." Havoco, supra, 626 F.2d at 558.

In much the same way, plaintiffs Galardo and Buchanan cannot triumph on their Section 2 claim by relying on an arbitrarily and narrowly defined market of Picabond sales to the U.S. Government. If they could, then

> the mere fact that one party bid unsuccessfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition. This would be contrary to the repeated view of the Supreme Court that the antitrust laws do 'not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.' Hunt v. Crumboch, 325 U.S. 821, 826, 65 S. Ct. 1545, 1548, 89 L. Ed. 1954 (1945).
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> Havoco, supra, 626 F.2d at 558.

Plaintiffs' failure to comply with the requirements of market definition discussed above necessitates granting a directed verdict in defendants' favor on plaintiffs' Sherman Act § 2 claim. We would simply point out in closing that plaintiffs cannot avoid these

requirements of adequate market definition by arguing that Picabond parts are patented. As Professor Sullivan has indicated, and the Ninth Circuit adopted,

> The basic law of Section 2 remains unchanged when it intermeshes with patent law. To establish a violation plaintiff must show either monopoly power plus exclusionary conduct or specific intent to monopolize plus exclusionary conduct. Existence of a patent is much less relevant to the power issues than might at first be supposed. A patent although creating a legal monopoly of the patented art, does not do away with the need to show possession of intent to acquire that degree of market power called monopoly. The existence of monopoly power cannot be inferred merely from possession of one or of one or more patents . . . the relevant market and the power of defendant must be proven independently, just as in cases where defendant's power is predicated on other entry barriers. (emphasis added)

Handbook of the Law of Antitrust, supra, at 507. See Mayview Corp. v. Rodstein, 620 F.2d 1347 (9th Cir. 1980); Hangards v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979). In short, plaintiffs' notion that Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) and subsequent authorities relieve them of the burden of proving the relevant market is a misconception. See, e.g., Mayview Corp., supra, 620 F.2d at 1355-1356.

Because plaintiffs have neglected to offer substantial evidence in support of their market definition, we are compelled to grant defendant's motion for a directed verdict on plaintiffs' Sherman Act § 2 cause of action.

V

Cartwright Act Claims

In addition to causes of action under federal antitrust law, plaintiffs have asserted claims for alleged violations of the Cartwright Act, Cal. Bus. and Prof. Code §§ 16600 et seq., its California counterpart. Because case law interpreting the Sherman Act is applicable to claims arising under California State antitrust statutes, defendants also are entitled to a directed verdict on plaintiffs' Cartwright Act causes of action. Corwin v. Los Angeles Newspaper Service Bur., Inc., 94 Cal. Rptr. 785, 791 (1971); 1 Witkin, Summary of California Law, at 379 (8th ed. 1973).

VI

Remaining Claims and Issues

In their motions for directed verdict, defendants also have requested judgment in their favor on plaintiffs' claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective economic advantage, and related issues. Because our review of the proceedings in this case and the applicable law indicates that plaintiffs have presented evidence from which a jury might reasonably rule in their favor on these various causes of action and specific issues, we deny this portion of defendants' motion.

Because we have granted defendants' motion for directed verdict with respect

to plaintiffs' federal and state antitrust claims, we do not reach defendants' contention that Helen Galardo lacks standing to assert an antitrust claim against defendants.

SO ORDERED.

DATED: January 8, 1982 (Signed)
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE